STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 7, 2003
v	No. 239731 Oakland Circuit Court
FREDERICK C. GORDON, Defendant-Appellant.	LC No. 2001-177132 FH

Before: Donofrio, P.J. and Fort Hood and Schuette, JJ.

PER CURIAM:

Following a jury trial, defendant was convicted of intent to deliver 50 to 224 grams of cocaine, MCL 333.7401(2)(a)(iii); possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v); possession of marijuana, MCL 333.7403(2)(d); operating a motor vehicle without a valid license, MCL 257.301; and possession of an open alcoholic liquor container in a vehicle, MCL 257.624a. He was sentenced concurrently to 10 to 20 years for intent to deliver 50 to 224 grams of cocaine, six months for possession of less than 25 grams of heroin and possession of marijuana, and 90 days for operating a motor vehicle without a valid license and possession of an open alcoholic liquor container in a vehicle. Defendant appeals as of right. We affirm.

I. FACTS

Before January 5, 2001, officers from the Narcotics Enforcement Section of the Pontiac Police Department were advised by another member of their unit to be on the lookout for a dark colored full-sized conversion van with green pin stripes and a black male occupant about 5'7"-5'8" tall, weighing about 180 pounds and having long hair and a goatee. The occupant of that van was supposedly selling cocaine from the van. On January 5, 2001, Officers Braddock, Pittman and Ferguson spotted a van and driver that fit the aforementioned description.

Braddock subsequently noticed that the occupant was not wearing his seat belt and notified his fellow officers. Pittman, in a marked police car, stopped defendant, for not wearing his seat belt while operating a motor vehicle. Pittman testified that he saw defendant moving back and forth in his seat and opened the van door. He found a partially full opened bottle of wine at defendant's feet. The officers arrested defendant and searched the van. Three baggies of marijuana and more than $1,900 in cash were found on defendant's person. The officers seized a can with a false bottom from under the driver's seat. The can contained three packages of

cocaine, a smaller amount of heroin, razor blades and baggies. Defendant's driver's license had also expired.

At trial, the Michigan State Police Crime Lab report showed that the three packages found in the bottom of the false-bottomed can were indeed cocaine in the amounts of 25.8 grams, 25.2 grams, and 13.6 grams. During cross-examination, Pittman, who was qualified as an expert in narcotics investigations, acknowledged that no fingerprints were found on anything seized. Defendant argued that the prosecution had failed to prove beyond a reasonable doubt that defendant knew of the drugs' presence in the van. After less than an hour of deliberation, the jury found defendant guilty of all counts as charged.

II. ANALYSIS

A. Suppression of Evidence

Defendant first argues that the stopping of the van and defendant's subsequent arrest were a pretext for searching the van and that the trial court committed reversible error in not suppressing evidence of the cocaine discovered in the search. We disagree.

Review of a lower court's factual findings in a suppression hearing is limited to clear error. Those findings will be affirmed unless this court is left with a definite and firm conviction that a mistake was made. *People v Davis*, 250 Mich App 357; 649 NW2d 94 (2002). The Court reviews de novo a lower court's ultimate ruling with regard to a motion to suppress evidence. *Davis, supra.*

Braddock testified that he pulled up next to defendant and was ahead of him by about a half a car length at a red light and observed defendant through the front windshield without his seat belt fastened. He notified his colleagues on the narcotics unit. Pittman, in a marked car, pulled the van over. Pittman testified that he saw defendant "moving around from side to side and, reaching down towards the sides of his seat." He subsequently opened the van door for safety purposes and witnessed a bottle of wine with a lot of wine missing. Pittman testified that he removed defendant from the van and placed him under arrest.

Defendant asserted that he took his seat belt off after he was pulled over since it was hindering him from reaching for his driver's license. Furthermore, defendant questioned whether Braddock could make this observation from his vantage point. Defendant testified that the bottle of wine was not near his feet, but from the rear of the van. Defendant asserted that Pittman's testimony was conflicting. At the preliminary examination Pittman testified that he found the bottle between the seats, next to his feet, on the floorboard. At the evidentiary hearing, Pittman testified that he found the bottle on the floorboard, near the driver's left foot. Pittman explained the discrepancy with his prior testimony by saying that he did not know if "… the transcripts were misinterpreted, or if I misspoke, but I clearly remember the bottle being near his left foot."

The trial court issued its opinion on defendant's motion to suppress and found the following with regard to the issue of defendant wearing his seat belt: "This Court finds that based on the credibility of the witnesses, having observed the witnesses, this Court agrees with the Officer that the defendant was not wearing his seat belt at the time of the initial stop."

The trial court found the following with regard to the location of the bottle of wine and defendant's ultimate arrest:

> This court believes that the fact that the defendant was also driving with an expired license does not appear to be reasonable that the police would make up the issue of the open intoxicants in order to further their basis for arrest of defendant.
>
> Obviously, an expired license is sufficient to cause an arrest. And the Court, again, looking at the total circumstance and the credibility of the witnesses believes that the intoxicants were as Officer Pittman has described them.

This Court yields to the trial court with regard to questions of credibility since the trial court has "…the special opportunity to judge the credibility of those witnesses who appear before it." *People v Brown,* 127 Mich App 436; 339 NW2d 38 (1984).

This Court finds that the stop was permissible because Braddock had probable cause to believe that defendant was not wearing his seat belt and therefore in violation of a traffic law. *People v Davis*, 250 Mich App 357; 649 NW2d 94 (2002) . The fact that the officers stopped defendant knowing that they might find narcotics is irrelevant. *People v Holloway,* 416 Mich 288; 330 NW2d 405 (1982).

Based on Pittman's prior knowledge from the tip that defendant was allegedly dealing drugs out of the van and defendant's furtive movements while Pittman approached the vehicle, Pittman could have believed defendant was armed and dangerous. If a police officer reasonably believes that the suspect is armed and dangerous, the officer may conduct a limited protective search for concealed weapons. *People v Gewarges,* 176 Mich App 65; 439 NW2d 272 (1989). This Court finds that Officer Pittman's conduct was reasonable when he opened the van door for reasons of safety.

With regard to defendant's constitutional claims, the United States Supreme Court ruled that ulterior motives do not invalidate police conduct on the basis of probable cause to believe that a violation of law has occurred. *Whren v United States,* 517 US 806; 116 S Ct 1796; 135 L Ed 2d 89 (1996). Furthermore, the fact that defendant was driving on an expired license would have resulted in an arrest and the subsequent discovery of evidence.

B. Insufficient Evidence

Defendant's second claim is that there was insufficient evidence to support his conviction of possession with intent to deliver cocaine. We disagree.

Evidence must be viewed in the light most favorable to the prosecution and the court must determine whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. *People v Wolfe* 440 Mich 508; 489 NW2d 748 (1992).

> This court has explained "… to support a conviction for possession with intent to deliver less than fifty grams of cocaine, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver." *Wolfe, supra.*

Defendant specifically challenges whether the prosecution proved that defendant knowingly possessed the cocaine with the intent to deliver it. Possession can be actual or constructive. *Wolfe, supra.* Defendant is correct to assert that a "person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession." *Id.* However, "… constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.*

The circumstances surrounding defendant's arrest include his moving around in the driver's seat while being approached by a police officer. Upon arrest, cocaine valued at $6,000 (approximately 60 grams at $100 per gram) was found under the seat where defendant was driving the car. Furthermore, razor blades that could be used to cut the cocaine as well as a smaller amount of heroin were also found in the can. Defendant was also carrying on his person more than $1,900 cash as well as three baggies of marijuana.

Viewing the evidence in a light most favorable to the prosecution, it is reasonable to infer that the owner of the cocaine would not loan the van out with such a valuable possession in it, but would in fact keep it close by. While no fingerprints were found on any of the items, a sufficient nexus exists between defendant and the cocaine found beneath his seat to prove constructive possession.

Affirmed.

/s/ Patrick M. Donofrio
/s/ Karen Fort Hood
/s/ Bill Schuette